SUPREME COURT, U. S.

FILED

AUG 17 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1966

No. 333

SEVILLE SYNDICATE INC., MUNDEK MARGULIES, AND CHASKEL MORGENSTERN,

Petitioners,

—against—

MORITZ KOZLOWSKI,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

McCARTHY & NATHANSON
Attorneys for Respondent
420 Lexington Avenue
New York, N. Y. 10017
MU 3-4200

32 CASE PRESS INC., 421 HUDSON ST., N.Y.—OREGON 5-4540

IN THE

Supreme Court of the United States

October Term, 1966

No.

SEVILLE SYNDICATE INC., MUNDEK MARGULIES, AND CHASKEL MORGENSTERN,

Petitioners,

—against—

MORITZ KOZLOWSKI,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Petitioners seek to have this Tribunal review the determination of the Supreme Court of the State of New York unanimously affirmed in the Appellate Division thereof and for a review of which leave was sought in the Court of Appeals of New York, and denied.

Examination of the record readily discloses that any dissatisfaction with the results of the Court proceeding was caused by the petitioners. They were parties to the agreements. They fixed and agreed to the terms upon which the hotel could be sold. To attempt to read into the decision, violations of constitutional rights is unwarranted. What the New York Courts ordered to be done was to carry out and perform what the petitioners agreed they would do. Such a direction obviously is not a deprivation of property without due process of law, nor is it a confiscation of property.

Petitioners continue in their efforts to mislead the Courts by repeated claims that the March 22, 1955 Agreement (Exhibit A) expired in 10 years and that since the offer to purchase was made May 28, 1965, (more than ten years later) "there was no 'contract' requiring a sale." This is not so.

Perusal of both stockholders agreements (Exhibit A and B) demonstrates that the 10 year expiration date in the former was limited to Paragraph I (requiring unanimous stockholders consent) and to Paragraph II A, 1 (requiring unanimous Director's consent).

The June 14th, 1956 agreement modified the former agreement and set forth the conditions to be met "in the event any of the parties desire that the hotel business and premises thereof should be sold * * *" (paragraph 4).

It is this Agreement which is the subject of the action.

No constitutional question was ever raised in the lower courts by petitioners.

Hon. Wilfred A. Waltemade, the Supreme Court Justice who wrote the opinion, was most meticulous in treating each issue raised and disposing of it.

There is no basis at all for a Writ of Certiorari.

POINT I

Rule 3212 of the Civil Practice Law and Rules relating to summary judgment does not deprive the defendants of a trial or property without due process of law in violation of the Constitutions of New York State and the United States.

The New York rule for Summary Judgment Rule 3212 of the CPLR (formerly Rule 113 of the Rules of Civil Practice) provides:

> "(a) . . . except as provided in subdivision (d) with respect to a matrimonial action, any party may move for summary judgment in any action after issue has been joined.
>
> (b) . . . a motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. The motion shall be denied if any party, shall show facts sufficient to require a trial of any issue of fact other than an issue as to the amount of the extent of the damages . . ."

Summary judgment is a procedural device for promptly disposing of actions in which there is no real, substantial or genuine issue as to any material fact. The summary

judgment rule eliminates a trial where a trial is unnecessary and would only result in delay and expense which may operate to defeat in whole or in part the recovery of a just claim. See Volume 6 *Moore's Federal Practice* Section 56.04, page 2057; *Chambers* v. *U. S.* (C.C. 8th, 1966) 357 Fed. 224; *Harris* v. *International Longshoreman's Association* (ED Pa. 1962) 210 F. Supp. 4, Affirmed (C.C.A. 3rd 1963) 321 Fed. 801.

> "The very object of a motion for summary judgment is to separate what is formal or pretended in denial or averment from what is genuine or substantial so that only the latter may subject a suitor to the burden of a trial. *Richard* v. *Credit Suisse,* 242 N.Y. 346."

Issue finding rather than issue determination is the key to the procedure. *Falk* v. *Goodman,* 7 N.Y. 2d 87, 91; *Sillman* v. *Twentieth Century Fox Film Corp.,* 3 N.Y. 2d 394, 404; *Woerfel* v. *Zivnestenska Banka,* 287 N.Y. 91.

The New York State and Federal Courts in construing the summary judgment rules as applicable in the Federal Court (Rule 56, Federal Rules of Civil Procedure and the New York State Rules, *supra*) have held that neither procedural statute in any way violates the Fifth and Fourteenth Amendment to the Federal Constitution or Sections 2 and 6 of Article 1 of the New York State Constitution. The application of the statutes do not unlawfully deprive the defendants of their property without due process of law.

Fidelity & Deposit Co. of Maryland v. *U. S.,* 187 U. S. 315, 23 S. Ct. 120, 47 L. Ed. 194; *Ex parte Peterson,* 253 U. S. 300, 40 S. Ct. 543, 64 L. Ed. 919; *Security & Exchange*

Commission v. *Payne,* 35 F. Supp. 873; *Suckow Borax Mines Consolidated* v. *Borax Consolidated* (C.C.A. 9th 1950), 185 F. 2d 196, 215, Cert. denied 340 U. S. 943, 71 S. Ct. 506, 95 L. Ed. 680; *General Investment Co.* v. *Interborough Rapid Transit Co.,* 235 N.Y. 133; *Stewart* v. *Ahrens,* 273 N.Y. 591; *Dwan* v. *Massarene,* 199 App. Div. 872, 192 N.Y.S. 577; *Hanna* v. *Mitchel,* 202 App. Div. 504, 196 N.Y.S. 43; Volume 6, *Moore's Federal Practice,* Section 56.06, pp. 2075-2080.

> "The argument that rule 113 infringes upon the right of trial by jury guaranteed by the Constitution cannot be sustained. The rule in question is simply one regulating and prescribing procedure, whereby the court may summarily determine whether or not a bona-fide issue exists between the parties to the action. A determination by the court that such issue is presented requires the denial of an application for summary judgment and trial of the issue by jury at the election of either party. On the other hand, if the pleadings and affidavits of plaintiff disclose that no defense exists to the cause of action, and a defendant, as in the instant case, fails to controvert such evidence and establish by affidavit or proof that it has a real defense and should be permitted to defend, the court may determine that no issue triable by jury exists between the parties and grant a summary judgment."

General Investment Co. v. *Interborough Rapid Transit Co.,* 235 N.Y. 133, 142-143.

> ". . . If it were true that the rule deprived the plaintiff in error of the right of trial by jury, we should pronounce it void without reference to cases. But it does not do so. It prescribes the means of making an issue. The issue made as prescribed, the

right of trial by jury accrues. The purpose of the rule is to preserve the court from frivolous defenses and to defeat attempts to use formal pleadings as means to delay the recovery of just demands. Certainly a salutary purpose and hardly less essential to justice than the ultimate means of trial." *Fidelity & Deposit Co.* v. *U.S.*, 187 U.S. 315, 319, 23 S. Ct. 120, 122.

"The command of the SEVENTH Amendment that 'the right of trial by jury shall be preserved' does not require that old forms of practice and procedure be retained . . . It does not prohibit the introduction of new methods for determining what facts are actually in issue, nor does it prohibit the introduction of new rules of evidence . . . No one is entitled in a civil case to trial by jury unless and except so far that there are issues of fact to be determined." *Ex parte Peterson* 253 U.S. 300, 309, 310, 40 S. Ct. 543, 546.

"Defendant claims, in his brief, that this motion for summary judgment is an effort on the part of the plaintiff to deprive defendant of his property without due process of law in violation of the FIFTH Amendment of the Constitution of the United States, and that he is entitled to a 'fair trial'. I think defendant is in error as to the purpose and authenticity of application for summary judgment . . . The very object of a motion for summary judgment is to separate what is formal or pretended in denial or averment from what is genuine and substantial, so that only the latter may subject a suitor to the burden of a trial . . . The court is authorized to examine evidence, not for the purpose of trying the issue, but to determine whether there is a genuine issue of fact proper for trial. If there is no genuine issue of fact in controversy, the parties are not entitled to a trial and the court, applying the law to the undisputed

material facts may render a summary judgment. If there is a genuine issue as to a material fact, the case will go to trial." *Securities and Exchange* v. *Payne*, 35 F. Supp. 873, 876.

The order appealed from which directed petitioners to specifically perform their agreements relating to the sale of the hotel business and premises owned by the corporate petitioner properly determined that on the basis of the pleadings, affidavits and exhibits presented to the court, there are no issues of fact warranting a determination upon a trial. The issues of law relating to the defenses raised by petitioners were based upon the admitted facts in the complaint and related to interpretations of the Business Corporation Law and Stock Corporation Law of New York State. The New York State Supreme Court and the Appellate Division construed and applied the New York State statutes to the facts presented and these defenses were stricken. The Court of Appeals saw no reason to upset the judgment. The objections to the proposed contract of sale were also fully considered by all of the New York State Courts and on the basis of New York law, the objections were overruled. The spurious attempt to raise any triable issue as to the bonafide offer of purchase obtained from a third party in accordance with the contracts between the parties was properly determined by the Court as sham and failing to raise a defense or to establish any facts sufficient to require a *trial* of any issue.

CONCLUSION

It is respectfully submitted that defendant's application for writ of certiorari to this court on the basis of the purported constitutional issues set forth in the supporting papers be denied in its entirety.

Respectfully submitted,

McCarthy & Nathanson
Attorneys for Respondent
420 Lexington Ave.
New York, N. Y. 10013
212 MU 3-4200

I. Z. Nathanson
Of Counsel
(A Member of the Bar of this Court)